

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIARRE HAMILTON,

Defendant-Appellant.

UNPUBLISHED

July 24, 2003

No. 236365

Wayne Circuit Court

LC No. 00-007557-01

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of life without parole for the felony murder conviction, twenty-five to forty years for the assault with intent to commit murder conviction, twenty to thirty years each for the armed robbery and assault with intent to rob convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Tranika Brown and the nonfatal wounding of Kelvin Brown, which occurred after defendant and codefendant Kenya Rogers had robbed Corey Gibbs, and then were interrupted by Tranika Brown when they were subsequently attempting to rob Kelvin Brown.

Defendant argues on appeal that he was denied a fair trial because of several instances of misconduct by the prosecutor. We disagree.

This Court generally reviews claims of prosecutorial misconduct on a case by case basis to determine whether the defendant was denied a fair trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000); *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Here, however, defendant did not preserve some of his allegations of misconduct with an appropriate objection at trial. *Schutte, supra*. We review these unpreserved claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Schutte, supra*.

Defendant first argues that the prosecutor improperly accused defense counsel during closing argument of attempting to “obfuscate” and “confuse” the case, and to “mystify” and shift the jury’s “focus off of what’s important.” Defendant did not object to the challenged remarks at trial. A prosecutor is afforded great latitude during closing argument, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and is not required to use the “blandest possible terms” to state his inferences and conclusions, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Although it is improper for a prosecutor to attack defense counsel and suggest that counsel is intentionally trying to mislead the jury, *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), the challenged remarks, viewed in context, were aimed at urging the jury to stay focused on the evidence. They did not constitute plain error. Further, it was not plainly improper for the prosecutor to argue that the defense view of the evidence was not worthy of belief. Cf. *People v Buckley*, 424 Mich 1, 14-15; 378 NW2d 432 (1985).

We agree that it was improper for the prosecutor to point to “Okla” on a chart after the court had earlier ruled, in response to an improper reference by defense counsel, that the jury was to disregard any references to “Oklahoma.” However, in light of the trial court’s instruction to the jury to disregard any references to Oklahoma, and defendant’s failure to pursue this issue further, we are satisfied that this isolated occurrence did not deprive defendant of a fair and impartial trial. *Reid, supra*.

Defendant further argues that the prosecutor improperly urged the jury to disregard the law. A defendant has no burden to produce any evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, the prosecutor does not shift the burden of proof by commenting on the improbability of a defendant’s theory, or by arguing, as he did here, that the evidence did not meet the definition of self-defense. Further, the jury was instructed that the arguments of counsel were not evidence and that it was to follow the instructions given by the court, even if the attorneys said something different. The court’s instruction was sufficient to cure any perceived prejudice. *Schutte, supra*. Defendant was not denied a fair trial on this basis. *Reid, supra*.

Having rejected defendant’s several claims of prosecutorial misconduct, we similarly reject his claim that the cumulative effect of the alleged misconduct denied him a fair trial.

Defendant also argues that he was denied the effective assistance of counsel because trial counsel failed to object to the prosecutor’s improper attacks on counsel’s veracity. Because defendant did not raise this issue in a motion for a new trial or a *Ginther*¹ hearing, our review of this issue is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the “counsel”

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

guaranteed by the Sixth Amendment and that the deficient performance prejudiced defendant. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, (1984); *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* Further, this Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999), or will it assess counsel's competence with the benefit of hindsight, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Counsel's decision about how to argue to the jury was a matter of trial strategy. It appears that, rather than object to the prosecutor's remarks, counsel attempted to turn those remarks to defendant's advantage in his own closing argument. Defendant has not overcome the presumption of sound trial strategy. The fact that the strategy was not successful does not amount to ineffective assistance. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Finally, defendant argues that the trial court improperly precluded him from questioning Gibbs regarding a pretrial capias and the sentences Gibbs received for his past convictions, thereby denying him his right to present a defense. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

In this case, there was ample evidence on the record to enable the jury to assess and evaluate Gibbs' credibility. The court was liberal in allowing defense counsel to elicit Gibbs' history of untruthfulness and experience with the criminal justice system. As defense counsel acknowledged below, Gibbs "unabashedly said how his responses to the police and the Court by way of testimony is to shift the heat or to get the heat off of him. He says how smart he is, and as an indication of how smart he is, how he got out of this one, meaning this case." There was no evidence that the prosecutor or police were involved in any "deal" in exchange for Gibbs' testimony. The jury was well aware of Gibbs' criminal record and his willingness to manipulate the system for his own benefit. The trial court did not abuse its discretion in limiting the cross-examination.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage